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Before the
Federal Communications Commission
Washington, D.C. 20554

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JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of Section 309(j))
 of the Communications Act)
 -- Competitive Bidding for Commercial)
 Broadcast and Instructional Television Fixed)
 Service Licenses)
)
 Reexamination of the Policy)
 Statement on Comparative)
 Broadcast Hearings)
)
 Proposals to Reform the Commission's)
 Comparative Hearing Process to)
 Expedite the Resolution of Cases)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

Comments of Hatfield & Dawson Consulting Engineers, Inc.

Introduction

The proposal to implement the use of competitive bidding in order to eliminate the back-log of mutually exclusive broadcast applications is a laudable one. However, as discussed below, the proposal to extend the use of competitive bidding to future mutually exclusive applications contains some significant flaws and raises serious procedural concerns.

Hatfield & Dawson supports the retention of the existing filing and processing procedures for AM, FM, FM translator, LPTV, and TV translator stations. We do believe that competitive bidding can be an effective means to resolve mutually exclusive applications. However, an auction should only occur when a mutual exclusivity situation arises, and then only after the parties involved have been afforded sufficient time to resolve the mutual exclusivity by modifying or withdrawing their applications.

Pending mutually-exclusive secondary broadcast applications, and post-June 30th AM and FM applications

The Commission notes at ¶¶ 39-42 of the NPRM that there are a number of pending mutually exclusive applications which are not subject to section 309(l), including applications for LPTV,

television translator, and FM translator stations, as well as several post-June 30th AM and FM applications. The Commission notes that section 309(j)(1) is silent on the question of applicant eligibility to participate in auction; specifically, whether new applicants should be permitted to file applications which may be mutually exclusive with the pending applications.

In those instances where the time for filing mutually exclusive applications under the existing procedures has passed, the windows should be kept closed, i.e. the Commission should not accept additional mutually exclusive applications. In these cases, ample opportunity (approximately two to four months) has already been provided for other interested parties to file applications. The pending applicants are already entitled to cut-off protection, and we see no reason why that protection should be rescinded.

Technical proposals and legal qualifications

The Commission indicates at §§ 62-70 of the NPRM that it will be necessary to file the technical data on either an FCC Form 301 (application for AM, FM or television construction permit), FCC Form 346 (application to construct LPTV station or television translator), or FCC Form 349 (application to construct FM translator) as a supplement to the short-form application to participate in an auction. The Commission states that this is in order to determine mutual exclusivity for participation in an auction, at the time of acceptance for filing

However, it will be necessary to conduct a review of the technical data submitted with the initial application, not only to determine mutual exclusivity, but also to determine whether the technical proposal is acceptable. For example, applications for AM stations, FM translators, LPTV stations, and TV translators must include interference studies to demonstrate the lack of prohibited contour overlap. Bidders whose technical proposals are unacceptable could easily push up the bid price for a bidder whose technical proposal is acceptable. Thus, complete allocation engineering data must be filed with these types of applications at the initial filing state.

For applications for new TV and commercial FM stations, the initial filing must be site-specific. Were non-site-specific applications to be made acceptable, a subsequent minor change application by an existing station, which protected the allotment reference coordinates but not actual usable site coordinates, would limit the new station applicant to unacceptable or undesirable sites.

Furthermore, in a case where there are two or more mutually exclusive applications, all but one of which are technically unacceptable, the auction should never take place at all! Technical review will reveal that only one of the applications is technically acceptable. The unacceptable applications should then be dismissed, and the acceptable application granted cut-off status.

A similar situation could easily occur where some applicants lack the legal qualifications to file a broadcast application. An opportunity must be provided for the Commission and the competing applicants to review the legal qualifications of short-form applicants. If any applicants are found to be unqualified to be licensees, then those applicants should be excluded from participation in the auction.

Without a review of short-form applicants' technical proposals and legal qualifications, the cost of

entry for *bona-fide* applicants with technically sound proposals could be greatly inflated, thus discouraging or even precluding participation by non-profit or community-oriented applicants.

Minor change applications

Hatfield & Dawson supports the Commission's proposal to allow licensees to file FCC Form 301, FCC Form 346 or FCC Form 349 applications for minor modifications at any time, in accordance with existing filing procedures. The Commission does not discuss, however, what sort of time frame would be used to determine whether two or more minor change applications would be considered mutually exclusive.

We support the present policy that a minor modification application is entitled to cut-off protection with respect to any applications which are filed subsequently. Specifically, we hold that the only case in which two such applications may be considered mutually exclusive, and therefore subject to auction, would be where both applications were filed on the same day.

If the Commission feels it necessary to establish a "window" for the filing of mutually exclusive minor change applications, to open on the day the first application is filed, and to end some time later (an idea which we do not support, but will nevertheless discuss), that "window" must be no longer than the window period which is established for the filing of major change applications. For example, were the Commission to establish, as proposed, a five-day filing window for major change applications, to allow a thirty-day period for the filing of mutually exclusive minor change applications would be an inconsistent application of policy.

Petitions to Deny

The Commission, at ¶ 77 of the NPRM, requests comment on the time period which should be established for the filing of petitions to deny against each auction winner's long-form application. Such a period should be at least 30 days long, consistent with present policy, in order to allow time to acquire a copy of the long-form application, review its contents, conduct research or an analysis, write the text of the petition, and submit it to the Commission.

A period of "5 days", which is briefly mentioned in the NPRM, is in many cases hardly sufficient to acquire a copy of an application from the Commission's files, let alone to prepare a petition to deny. Were the time period established to be this short, it would place licensees in the western states at a distinct disadvantage to their counterparts in the immediate DC area, insofar as their ability to speedily acquire a copy of a given long-form application for review.

This would be particularly true in the case of applications for new FM stations, which under the Commission's proposals would not be required to include any technical data with the short-form application. Additional time would be necessary to review the technical data once it is finally submitted by the auction winner in its long-form application.

Major changes beyond the applicant's control

No consideration is given in the NPRM to major change applications which are beyond the applicant's control. For example, a station may suddenly lose its site and need to file an application for a new site, an application which happens to fit the definition of a major change. We have been involved in at least one such situation, where a 1 kW AM station was forced to file a site change application, specifying facilities which would not place a principal community contour over the existing community of license. It was therefore necessary to specify a new community of license.

In order to accommodate this sort of application, major change application filing windows would have to be established at regular and frequent intervals. In fact, the filing windows would have to occur so frequently as to defeat the purpose of establishing filing windows at all.

Elimination of "A" cut-off lists

We note that by the Commission's proposals there would no longer be "A" cut-off lists for AM stations and FM translators as they now exist. Under the present procedures, there is generally a period of several months following the filing of a given application (including the thirty days following the publication of the "A" cut-off list) during which mutually exclusive applications may be filed.

Per the Commission's proposals, mutually exclusive applications could only be filed during an established 5-day filing window. Under this arrangement, the filing of mutually exclusive applications could only be attributed to chance. There is no opportunity for additional potential applicants to learn, for example, that the last available frequency in their area has been requested, and to file an application of their own. While it is true that this arrangement could reduce the number of mutually exclusive applications which are filed, it is also true that it could reduce the opportunity for interested, qualified parties to participate in the process.

A 5-day filing window is a totally inadequate period. Either no mutually exclusive applications should be permitted after the first filed (contrary to the Commission's intent), or a reasonable window period for the filing of mutually exclusive applications should be set.

Timing of Filing Windows

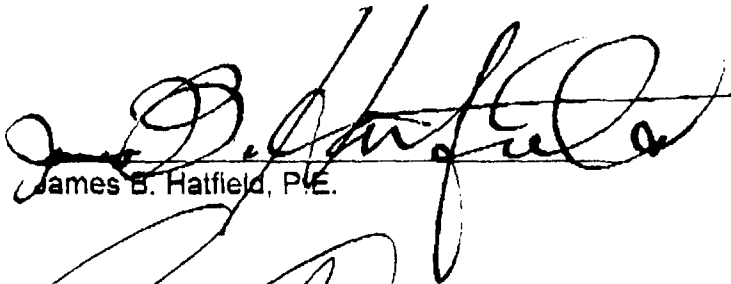
If the filing windows established under the Commission's proposals are infrequent, the result will be burdensome on legal counsel and consulting engineers, who will find it very difficult to balance their workload in the face of sudden pressure to prepare and file applications before the window closes. This will be particularly true if the windows do not occur at regular intervals, and nobody knows when the next window will open.

The sudden influx of applications would also be burdensome on the Commission's staff, who must process these applications in a timely fashion. This will result in an unevenly-distributed workload for the staff, which is surely not the Commission's intent.

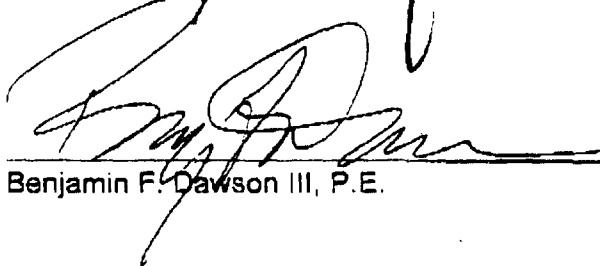
In order to not overburden Commission staff, as well as those responsible for application preparation, application filing windows would have to be established at regular and frequent intervals. In fact, the filing windows would likely have to occur so frequently as to defeat the purpose of establishing filing windows at all.

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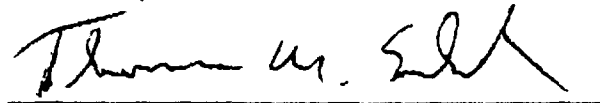
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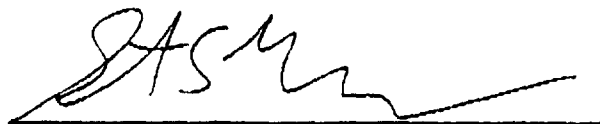
James B. Hatfield, P.E.



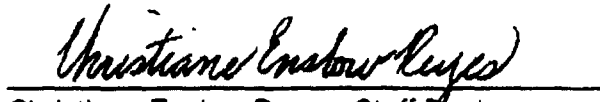
Benjamin F. Dawson III, P.E.



Thomas M. Eckels, P.E.



Stephen S. Lockwood, P.E.



Christiane Enslow Reyes, Staff Engineer



Erik C. Swanson, Staff Engineer